

NO. 83-597

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

**DALLAS COUNTY COMMISSIONERS COURT,
ET AL.,**

PETITIONERS

VERSUS

MARSHA RICHARDSON, ET AL.,

RESPONDENTS

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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Respondents respectfully pray that the Petition for Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on July 22, 1983, be denied.

REASONS FOR DENYING WRIT

Petitioners have severely mischaracterized the judgment of both the District Court and the Court of Appeals. Contrary to Petitioners' bald assertion, the Fifth Circuit did not rely upon its pre-*Falcon* "across-the-board" class action standard in affirming the District Court Class Certification Order.

There are no special or important issues presented in

Petitioners' Petition for Certiorari. The Judgment of the Fifth Circuit Court of Appeals awards individual relief to only five successful class members. Furthermore, the County has already paid the awards to the five successful class members as part of a settlement with the Office of the Treasury.

Finally, Petitioners attempt to raise a number of issues in their Petition for the first time in this nearly decade long lawsuit. The decision below fully accords with the decisions of this Court. Petitioners' reliance upon this Court's decision in *General Telephone Company of the Southwest vs. Falcon*, 457 U.S. 147 (1982) is misplaced. *Falcon* did not hold that an employee could never adequately represent a class which included applicants. Indeed, *Falcon* expressly recognized that in appropriate circumstances an employee may represent a class of both applicants and employees. In language especially appropriate to the facts of this case this Court stated:

Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes.

Both the District Court and the Court of Appeals found Respondent to be a proper class representative of both unsuccessful female applicants and employees of the Sheriff's Department. One of the Respondent's successful challenges was the policy of the Dallas County Sheriff to assign all new female deputies to the jail and to restrict their transfers to a more desirable section. Because the

section of the jail available for females was smaller than the male section, the Sheriff's policy by necessity limited the number of female deputies that could be employed by the Sheriff's Office. The same policy, adversely affected employees by restricting their transfer and promotion opportunities. As such, both applicants and employees were adversely affected by the same practice. (A-9, Appendix to Petitioner's Brief)

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners contend that the decision of the Fifth Circuit conflicts with that of the Third Circuit in *Scott v. University of Delaware*, 601 F.2d 76 (3rd Cir. 1979). *Scott* is easily distinguishable from the case at bar. In *Scott* the Third Circuit found a conflict of interest between *Scott* and the other class members. *Scott* disputed the validity of the University's requirement of a doctoral degree as a primary hiring criterion. He thus attacked via the applicant class the very degree which he possessed and which he asserted in his own favor in seeking relief on his individual disparate treatment claim. *Scott*, 601 F.2d at 86. Respondent, unlike *Scott* was discriminated by the policies she was challenging.

Petitioners, in addition, assert that there is a conflict between the case at bar and the decision of the Tenth Circuit in *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981). Petitioners did not appeal the District Court's finding that a Deputy Sheriff is an employee within the meaning of Title VII and that the Commissioners are employers. (A-13, Appendix to Petition for Certiorari). Consequently, this argument cannot be raised for the first time before this Court. Federal Rules of Civil Procedure 46, 5A *Moore's Federal Practice* ¶46.02.

Petitioners' other challenges to the validity of the District Court's Class Certification and Order of Class Relief should not be considered by this Court because of Petitioners' failure to raise this issue either before the District Court or the Court of Appeals. On two separate occasions Petitioners specifically moved the District Court to reconsider the Class Certification Order. On April 22, 1980, the District Court denied Petitioners' Motion to Amend Findings of Fact and Conclusions of Law for new trial. On February 1, 1982, the District Court denied Petitioners' Motion for Reconsideration of Class Certification. In neither of these two specific motions, nor at trial nor on appeal did the Petitioners raise the many issues they are now contesting. Petitioners are now barred from raising any new issues before this Court more than four years after the District Court certified the class.

THE DECISION BELOW IS CORRECT

The Fifth Circuit was correct in rejecting the Petitioners' alternative argument that even if the Class were properly certified the five successful claimants did not sustain their burden of proof with respect to an entitlement of back pay. The Fifth Circuit correctly found that Petitioners' reliance upon *Burdine* was misplaced. As the Fifth Circuit stated "the burden of proof imposed on the Plaintiff in the liability phase of a Title VII Class Action, termed Phase I, differs from that imposed in the relief phase, termed Phase II." In this case, the District Court found class-wide sex discrimination in Phase I. The Petitioners do not now challenge this ruling. Instead, they argue that the individual claimants did not meet their *Burdine* burden of proving an entitlement to back pay. *Burdine*, however, does not control in Phase II.

The decision of the Fifth Circuit fully accords with the prior decision of this Court in *Teamsters v. United States*, 431 U.S. 324, 362. In addition the Petitioners' argument as recognized by the Fifth Circuit ignores the clearly erroneous standard for reviewing the District Court's factual findings in support of their entitlement to back pay. *Pullman Standard vs. Swint*, 456 U.S. 273 (1982).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PALMER, PALMER & COFFEE

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ATTORNEYS FOR RESPONDENTS

PROOF OF SERVICE**STATE OF TEXAS****COUNTY OF DALLAS**

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared LINDA N. COFFEE, who being by me duly sworn, upon oath stated: I, LINDA N. COFFEE, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Respondents herein in all proceedings in which they have been involved as named parties in the Courts below.

I further state upon oath that upon the 9th day of November, 1983, I served copies of the foregoing Petition for Denying Writ of Certiorari on the Petitioners by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Earl Luna, Law Offices of Earl Luna, P.C., 2416 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, Attorney for Petitioners, Dallas County Commissions Court, et al., to Ms. Joann Peters, 401 Stemmons Tower West, 2730 Stemmons Freeway, Dallas, Texas 75207, Attorney for Respondent Carol Gassner, and to Ms. Sue LaGarde, Assistant District Attorney, 9th Floor, Dallas County Courthouse, Dallas, Texas 75202, on this 9th day of November, 1983.

Linda N. Coffee

SUBSCRIBED AND SWORN to before me by the

said Linda N. Coffee, this the 9th day of November, 1983.

Notary Public in and for
Dallas County, Texas